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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| ALMA SANCHEZ,<br>Plaintiff and Appellant,<br>v.<br>THE RETAIL PROPERTY TRUST,<br>Defendant and Respondent. | G041694<br>(Super. Ct. No. 07CC07782)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Reversed.

Blumberg Law Corporation; John P. Blumberg and Ave Buchwald, for Plaintiff and Appellant.

Weston Herzog, William S. Weston and Lori L. Vieira, for Defendant and Respondent.

Alma Sanchez appeals from a judgment entered after the trial court granted summary judgment in favor of Retail Property Trust (Retail) in Sanchez's action for negligence. The suit arose after Sanchez slipped and hurt herself at the Brea Mall, which is owned by Retail. Because there is a material dispute of fact as to whether the flooring on which Sanchez slipped constituted a dangerous condition, we reverse.

## FACTS

On July 14, 2005, Sanchez went to the Brea Mall with her daughter Crystal. At the time, Sanchez had a stress fracture in her left foot and was wearing a cast from just below her knee to the middle of her foot. She was also using crutches to help her walk. As she and Crystal made their way about the mall, they stopped by the food court and ordered some coffee drinks. When their drinks arrived, they headed toward a nearby bench, with Sanchez leading the way and Crystal following behind with the beverages.

Along the way, Sanchez suddenly felt her right crutch slide out from under her. She struggled to maintain her balance, and to avoid falling, she lowered her left foot to the ground in a rapid, stomping motion. The impact to her foot was jarring, but Sanchez gathered herself and made it over to the bench. She then began to feel sharp pain in her left foot.

Sanchez was not exactly sure what caused her crutch to slip away from her. However, as she was sitting on the bench afterward, she noticed the tile flooring was sloped in the area where she had slipped. When Crystal asked her what had happened, she told her that while she was walking in this sloped area, her crutch slipped away from her, causing her to lose her balance. Later, at her deposition, Sanchez said she couldn't control her crutch from slipping, that it felt like it was "sliding down a hill."

Sanchez's personal injury action against Retail alleged a single cause of action for negligence/premises liability. Retail denied any wrongdoing and moved for summary judgment "on the grounds that (1) there is no dispute as to any material fact and (2) plaintiff cannot establish that Retail exposed her to an unreasonable risk of harm." In support of these claims, Retail submitted a declaration from mechanical engineer Isaac Ikram, who examined the area where Sanchez slipped. He determined the tile in that area was sloped at a grade of 6.8 percent. However, he believed it was in compliance with the Uniform Building Code and had sufficient slip-resistance to make it safe.

Retail also submitted a declaration from the director of operations for the mall. He stated the mall is inspected every morning for hazards, and the area where Sanchez slipped has never required any repair or alteration. He also stated that, although the mall receives about 15 to 20 million visitors per year, no one has ever reported any problems or injuries in the area where the accident occurred.

Sanchez opposed the motion on two basic theories. First, although the flooring in question complied with the Uniform Building Code, it did not comply with the Americans with Disabilities Act (ADA). And second, the flooring nevertheless constituted a dangerous condition due to its basic configuration and layout within the mall. Sanchez supported these theories with a declaration from civil engineer Brad Avrit, who detected a 6.1 percent slope in the tile in question. It was his opinion the slip-resistance of that tile was insufficient under ADA regulations. And beyond that, the flooring was unreasonably dangerous for the following reasons.

"Firstly, there are no visual cues (such as a warning sign or handrail) to alert a mall patron to the existence of the sloped surface. Secondly, a condition such as this would be unexpected as all of the surrounding walking surfaces in the mall are flat/level and not sloped. [Thirdly], the attention of persons within the mall is intentionally being diverted toward merchandise and signage and away from the floor

surface. In addition, a person using crutches develops a rhythm and balance when negotiating a flat surface. This rhythm would be interrupted if they unexpectedly encountered the sloped surface and the person could easily lose balance. One crutch would unexpectedly be lower and on a slope which would require greater slip resistance than the other crutch, and therefore someone on crutches would be especially susceptible to this slip hazard."

Avrit also believed the sloped surface where Sanchez slipped was a direct cause of her injuries, and the cost to remedy the hazard created by the slope would be minimal compared to the risks it created.

In its reply, Retail submitted a supplemental declaration from Ikram in which he asserted the subject flooring complied with the ADA and was generally safe for people on crutches. Retail also objected to Avrit's opinions, claiming they were speculative and lacked foundation. It was Retail's position that Avrit simply wasn't qualified to render an expert opinion on the issues presented in the case.

The trial court overruled Retail's objections to Avrit's declaration. However, it determined Sanchez failed to prove the subject flooring violated ADA standards or otherwise constituted a dangerous condition. In so ruling, the court found Sanchez "did not see anything slippery or wet on the floor" and "did not know what caused her to trip." Therefore, it granted summary judgment in Retail's favor.

## DISCUSSION

Sanchez contends the court's ruling was erroneous because there was conflicting evidence as to whether the floor constituted a dangerous condition. While she does not dispute the court's finding the floor complied with the ADA, she argues Avrit's declarations constituted substantial evidence the floor was unsafe for people on crutches, and therefore summary judgment was improper. We agree.

Initially, we note the fact the flooring in question complied with the building code and ADA regulations did not relieve Retail of its basic duty to exercise

reasonable care with respect to patrons of the mall. Nor does it necessarily show that Retail fulfilled its duty in that regard. (*Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901 ["Compliance with safety regulations does not necessarily negate breach of duty"].) Rather, that fact is simply one factor in the negligence analysis. (*Ibid*.)

So is the fact that no one besides Sanchez has ever reported a problem with the flooring in the area where she slipped. Just because Retail has never received any complaints about the flooring does not mean it is safe. It is entirely possible other people have slipped on the flooring and were hurt but never bothered to do anything about it. (See *Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346 [absence of prior accident *claims* regarding subject location did not establish the absence of prior *accidents*].) Moreover, while "the absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous[,]'" it is not dispositive as to that issue. (*Ibid*.)

The overarching question remains as to whether Retail used reasonable care to keep the mall premises free of dangerous conditions. (*Alcarez v. Vece* (1997) 14 Cal.4th 1149, 1156.) A "dangerous condition" is "one which a person of ordinary prudence should have foreseen would appreciably enhance the risk of harm." (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 209.) Whether a particular condition is a dangerous condition is a question of fact, unless reasonable minds could only come to one conclusion on the issue. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133.)

In deciding the flooring on which Sanchez slipped did not constitute a dangerous condition, the trial court noted Sanchez did not see anything slippery or wet in that area. However, her claim for negligence was based on the slope of the flooring, not the presence of some external agent that made it slippery. While it is true she didn't know *exactly* what caused her accident, she did suspect it was due to

the slope of the flooring in the area where she slipped. As she said in her deposition, the floor in that area was so uneven, it felt like her crutch was "sliding down a hill" when she put it down there. Both sides' experts also agreed the flooring was slopped, and based on his review of the case, Avrit was sure "the sloped surface was a direct cause of [the] incident and [Sanchez's] resulting injuries." Suffice it to say, the record contains substantial evidence Sanchez's slip was attributable to the sloped tile on which she was walking.

What it boils down to then is whether the slope of the floor made it a dangerous condition. As noted above, that determination is factual in nature and cannot be decided as a matter of law unless reasonable minds can only come to one conclusion. (*Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 30.) While Retail's expert was of the opinion the floor was safe, Sanchez's expert disagreed. In fact, Avrit believed the floor was particularly dangerous for people using crutches because there were no warning signs to let them know of the sudden slope that existed in that area. Avrit believed the slope could disrupt the rhythm of a person using crutches, and thus the overall "configuration of the . . . area was unsafe and created an unreasonable risk of harm . . . ."

Taken at face value, Avrit's opinion in this regard created a material question of fact as to whether Retail breached its duty of care to Sanchez. That he believed the flooring constituted a dangerous condition and Ikram opined otherwise would itself suggest summary judgment was inappropriate. (See *Hernandez v. KWPH Enterprises* (2004) 116 Cal.App.4th 170, 176 [conflicting experts preclude summary judgment].) Retail does not really dispute this. Instead, it argues Avrit's opinions should be disregarded because he is not sufficiently qualified to render an expert opinion as to whether the flooring was dangerous. The record shows otherwise.

Avrit is a licensed civil engineer and the president of a company that does construction consulting and safety engineering. He has qualified as a safety

expert in over 200 cases and "conducted safety inspections and/or investigated more than 4,000 projects in the State of California." He also has "forensically investigated more than 3,000 litigation cases that cover a wide variety of topics," including premises liability and slip and fall accidents. And of those investigations, "dozens [have involved] a fall on a sloped walking surface."

Beyond this broad experience, Avrit also personally investigated the area where Sanchez slipped, interviewed her about the accident and reviewed the discovery materials in the case. This provided him with sufficient information to apply his specialized knowledge to the particular circumstances presented. All things considered, it readily appears he has sufficient "special knowledge, skill, experience, training, or education" to render an expert opinion on whether the area constituted a dangerous condition, and the trial court was correct in so ruling. (Evid. Code, § 720, subd. (a); see generally *People v. Hogan* (1982) 31 Cal.3d 815, 852 [reviewing court may not second-guess witness's expertise unless he "'*clearly lacks* qualification as an expert witness.'"].)

Retail also argues Avrit's opinions should be disregarded because they essentially constitute an unpleaded theory of liability that Sanchez devised simply to overcome summary judgment. In so arguing, Retail suggests Sanchez's complaint was required to include every conceivable factual circumstance relevant to her claim of negligence. However, a cause of action for negligence may be alleged in general terms: "'"[A] plaintiff is required only to set forth the essential facts of his [or her] case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his [or her] cause of action. [Citation.]"'" (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.)

In her complaint for negligence/premises liability, Sanchez alleged that, while walking on crutches, she slipped and hurt herself on an uneven section of

flooring at Retail's mall. This allegation was sufficient to inform Retail of the nature of her claim, and, as would be expected, her claim has been more fully developed in the formal discovery process. As such, Retail cannot complain that Avrit's opinions effectively comprise a new and unalleged theory of liability.

In a related argument, Retail asserts Avrit's opinions lacked sufficient foundation because they were not grounded in the facts of the case. It is no doubt true that "[t]he value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.]" (*Pacific Gas and Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

In attacking Avrit's opinions, Retail insists there is no evidence to support his theory that the slope of the tile and the lack of warning signs are what actually caused Sanchez to lose her balance. However, Sanchez alleged that as she was walking she suddenly felt her crutch slip away from her. It is undisputed that, unlike other areas of the mall, the tile was sloped in the area where she slipped. It is also undisputed Retail provided no notice of this. In that case, Sanchez would not have had any reason to know she needed to shift her attention from the general environs of the mall to the tile beneath her.

Ultimately, of course, it will be up to the trier of fact to decide whether these factors made the area dangerous for Sanchez. However, for purposes of summary judgment, there was a sufficient factual basis to support Avrit's opinion they did. Therefore, we may properly consider his opinion in reviewing the trial court's decision. (See generally *Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332-1333 [expert declarations in *opposition* to

summary judgment motion should be liberally construed and need not contain the same level of specificity required for expert declarations in *support* of motion].)

Considering all the evidence that was presented, both for and against summary judgment, we are convinced the question of whether the flooring constituted a dangerous condition presents a triable issue of fact for the jury. Therefore, the trial court erred in concluding otherwise.

The issue of whether Retail had notice of the alleged dangerous condition is also a question of fact. Retail did present evidence that the mall is inspected regularly for hazards and that no one has ever noticed, let alone complained of, the tile in question. However, "[t]he questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury. [Citations.]" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843.)

Furthermore, notice may be imputed if the defendant created the dangerous condition or it is of a permanent nature. (*Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806; *Sanders v. MacFarlane's Candies* (1953) 119 Cal.App.2d 497, 501; 65A C.J.S. (2010) Negligence, § 843.) Here, the evidence indicates the tile in question is part of the very structure of the mall, and Retail has not alleged otherwise. Nor has it offered any evidence it did not create the condition which allegedly caused Sanchez to slip and hurt herself. For these reasons, as well, Retail is not entitled to summary judgment by virtue of the notice issue.

## DISPOSITION

The summary judgment in Retail's favor is reversed. Costs of appeal are awarded to Sanchez.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.